only an equitable interest in shares held by some other member of the appellant, in this case the 1st defendant, and article 10 of the appellant's articles of association makes the position clear *ob majorem cautelam*. Even if the respondent is entitled to institute a minority shareholder's action against the appellant for any reason, relief cannot be sought under section 181 merely because facts are established which would found a minority shareholder's action (*Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[14]) (at page 229).

In any event, no relief under section 181 can possibly lie in respect of the proceedings at the annual general meeting of the appellant held on July 2, 1977 when it was resolved to sell the Perak land as no question has been raised as to the regularity of that meeting or the notice thereof and the notice of that meeting sets out the resolution to be passed in clear, specific and unequivocal terms for the sale of the Perak land at the best market price possible, and furthermore there is no plea or any indication whatsoever that the respondent's proxy who attended that meeting on his behalf made any objection to the resolution in question. I would add that according to a letter dated July 7, 1977 to the respondent from his proxy, the sale would be for a minimum price of $5,920,000 based on a valuation report by a firm of valuers "but with a view to sell the same at the original acquisition price of the said land, plus interest and costs as proposed by (the respondent)."

In the circumstances I have adumbrated, it is abundantly clear that the respondent has no reasonable cause of action enforceable against the appellant, and the proceedings instituted by him against it are vexatious and frivolous and an abuse of the process of the court and obviously unsustainable.

6. *The order of August 5, 1977.*

I need only add that it follows that the order of August 5, 1977 should not have been granted as the respondent had no right in the circumstances to the temporary injunction sought by him as, if there is no cause of action against the appellant, there can be no serious question to be tried between them, nor was he entitled in any event to the interlocutory order in respect of a sum of at least $1,200,000 out of the proceeds of sale on a summons that was not merely interlocutory but also *ex parte* and made previous to service of the writ and before appearance was entered and seeking a mandatory order that in the event of a sale of the Perak land for the highest bid by public auction the appellant should keep undisposed of and unencumbered at least that amount out of the proceeds of any such sale, and I would refer in the latter respect to *Felton* v. *Callis*[15] (at page 218-219) which held that even where a cause of action subsists it would require an exceptional case to justify making a mandatory order in such circumstances and the court should be most reluctant to make an order for the mere payment of a sum of money, and, I would interpose and add parenthetically, for that matter, for freezing a person's assets, in this case the appellant's funds to the extent of some $1,200,000, as this would virtually amount to circumventing the provisions of Order 14 of the Rules of the High Court and, quite apart perhaps from also raising the spectre of undue preference in the light of the resolution of the appellant for the sale of the Perak land disclosing its indebtedness to other creditors for a substantial sum, in effect giving the appellant *in limine* only the equipollent of conditional leave to defend the action — and all this all the more so when the respondent had lent the moneys in question not to the appellant but to the 1st defendant for the latter to purchase shares in the appellant and the respondent has accordingly no privity with or claim against the appellant in respect thereof.

7. *Conclusion.*

I would accordingly allow the appeal, set aside the order made on September 14, 1977 and strike out the statement of claim in so far as it relates to the appellant as 2nd defendant in these proceedings and dismiss the action against it with the inevitable result that the order of August 5, 1977 is *ipso facto* discharged. The appellant will have its taxed costs of the action including its motion and the costs of this appeal. The deposit lodged in court by way of security will be paid out to the appellant.

Raja Azlan Shah C.J. (Malaya) and **Chang Min Tat F.J.** concurred.

Appeal allowed.

Solicitors: *Allen & Gledhill; S.M. Ratnam & Co.*

CENTRAL SECURITIES (HOLDINGS) BHD. v. HARON BIN MOHAMED ZAID

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya) and Wan Suleiman F.J.) February 26, March 2 and May 16, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 105 of 1978]

Practice and Procedure — Third party notice — Application for final judgment against third party — Whether there is question proper to be tried between defendant and third party — Application for consolidation — Transfer of shares, — Register of members — Rectification by company — Delay in bringing action — R.S.C. 1957, O. 14.

Company Law — Register of members — Rectification — Transfer of shares — Companies Act, 1965 (Act. 125), ss. 103 & 162.

Contract — Sale of shares — Contract not severable — Restitution — Breach of warranty — Sale of Goods Act, 1957, ss. 13(2), 38 and 59.

The respondent in this case had agreed to sell 560,000 shares to a company, which he in turn bought from the third party (appellants). The company paid the total sum for the shares but later discovered that the instrument of transfer in respect of 523,278 shares had been executed in favour of International Holdings (Pte.) Ltd. In the meantime the shares were registered in the name of the company. The company brought an action for the refund of the purchase price paid in respect of the 523,278 shares, damages, interest and costs. The respondent, the defendant to that action, took out a third party summons against the appellants. The respondent submitted to judgment and the learned trial judge gave leave to the company to enter final judgment by consent. The application of the appellants to set aside the third party notice was dismissed and the learned trial judge gave leave to the respondent to enter final judgment against the appellants. The appellants appealed and contended that (a) there was a question proper to be tried between the respondent and the appellant in that the agreement had been performed and (b) the issue between the respondent and the appellant formed the subject of a separate action and the learned trial judge was wrong in refusing to allow consolidation.

Held: (1) having regard to all the circumstances of the case the learned trial judge was wrong in giving summary judgment to the respondent, as there was a question proper to be tried between the parties;

(2) in the circumstances the learned judge was wrong in not allowing consolidation of the two actions as the parties were the same, the actions arose out of the same transactions and the questions of fact and law were common to them.

Cases referred to:-

(1) *Waterford Turkish Baths Co.* v. *Barter* 17 Ir. L.T.R. 61.
(2) *Greville* v. *Hayes* [1894] 2 Ir. R. 20.
(3) *Baxter* v. *France* [1895] 1 Q.B. 455.
(4) *Gloucestershire Banking Co.* v. *Phillips* (1884), 12 Q.B. 533.
(5) *Re Paradise Motor Co. Ltd.* [1968] 2 All E.R. 625.
(6) *Fitch* v. *Lovell* [1962] 2 All E.R. 685.
(7) *Hawkes* v. *McArthur* [1951] 1 All E.R. 22.
(8) *St. John Shipping Corporation* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267; [1957] 3 All E.R. 683.
(9) *Hunt* v. *Silk* (1805) 5 East 449.
(10) *Taylor* v. *Hare* (1805) 1 B. & P.N.R.
(11) *Lawes* v. *Purser* (1856) 6 E. & B. 930.
(12) *Clarke* v. *Dickson* (1858) E.B. & E. 148.
(13) *Lindsay Petroleum* v. *Hurd* (1874) L.R. 5 P.C. 221, 239.
(14) *Erlanger* v. *New Sombrero Phosphate Company* (1878) 3 App. Cas. 1218, 1278.
(15) *Rowland* v. *Divall* [1923] 2 K.B. 500.
(16) *Biggerstaff* v. *Rowatt's Wharf Ltd.* [1896] 2 Ch. 93.
(17) *Platt* v. *Rowe* 26 T.L.R. 49.
(18) *Kwei Tek Chao* v. *British Traders and Shippers* [1954] 2 W.L.R. 365, 372.
(19) *Ward* v. *South Eastern Railway* 119 R.R. 968.
(20) *Re Derham and Allen Ltd.* [1946] Ch. 31, 36.
(21) *In re Len Chee Omnibus Co.* [1969] 2 M.L.J. 202.
(22) *Reese River Silver Mining Co.* v. *Smith* (1869) L.R. 4 H.L. 64.
(23) *Ansett* v. *Butler Air Transport Ltd.* (1958) 75 W.N. 299.
(24) *In re Poole Firebrick and Blue Clay Co. Ltd.* (1874) L.R. 18 Eq. 542.
(25) *First National Reinsurance Co.* v. *Greenfield* [1921] 2 K.B. 260, 279.
(26) *In re Scottish Petroleum Co.* (1882) 23 Ch. D. 413.
(27) *Payne* v. *British Time Recorder* [1921] 2 K.B. 16.
(28) *Horwood* v. *British Statesman Publishing Co. Ltd.* [1929] W.N. 38.
(29) *Daws* v. *Daily Sketch* [1960] 1 W.L.R. 126; [1960] 1 All E.R. 397.

FEDERAL COURT.

Lim Kean Chye (*M. Sivalingam* and *Nik Mohamed Din* with him) for the appellants.

V.C. George (*K.S. Narayanan* and *Joginder Singh* with him) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): The facts in this case are fully stated in the judgment of Harun J., in which (1) he dismissed the application of Central Securities (Holdings) Berhad, "the third party" to set aside the third party notice, and (2) he allowed Haron bin Mohd. Zaid "the defendant" to enter final judgment against the third party.

On March 12, 1975 the defendant agreed to sell to Syarikat Seri Padu Sdn. Bhd. "the plaintiffs" 560,000 fully paid-up ordinary shares of $1 each of United Holdings Bhd. at $8 per share. The plaintiffs paid the total sum of $4,480,000 for the said shares and the defendant agreed to deliver to the plaintiffs the share certificates and the instruments of transfer within one week. The defendant delivered effectively only 36,722 shares. The plaintiffs' claim was for the refund of the purchase price of $4,186,224 paid in respect of the undelivered 523,278 shares, damages, interest and costs.

The writ was filed on May 21, 1977. The defendant entered appearance on June 13, 1977 and on June 21, 1977 took out a summons for leave to issue and serve a third party notice on the third party. The said leave was granted on July 18, 1977. The defendant claimed that the shares he sold to the plaintiffs were part of the 1,400,000 fully paid ordinary shares of $1 each of United Holdings Bhd. at $8 per share he had acquired from the third party under a written agreement dated December 7, 1974. On January 22, 1975 the defendant paid the third party the total purchase price of $11,200,000 for the said shares whereupon the latter delivered to the defendant share certificates of this amount and the necessary instruments of transfer. One of the share certificates is numbered 0227 for 523,278 shares together with the relevant instrument of transfer "Exhibit H1". Pursuant to the agreement of March 12, 1975 with the plaintiffs, the defendant then delivered to them *inter alia* the said share certificate numbered 0227 and the instrument of transfer. On December 13, 1976, some 20 months afterwards, the plaintiffs discovered, so they alleged, that the instrument of transfer in respect of share certificate numbered 0227 was executed by the registered owner Dr. Chong Kim Choy in favour of International Holdings (Pte) Ltd. In the meantime, the shares were registered in the name of Seri Padu. On being registered the defendant made repeated requests to the third party for a registrable instrument of transfer but the latter refused and failed to deliver the transfer form or other shares of this amount whereby the defendant claims from them that he is entitled to substantially the same relief and/or remedies as claimed by the plaintiffs against the defendant.

The third party entered a conditional appearance to the third party notice on September 8, 1977 and on September 30, 1977 applied to set aside the said notice. On October 3, 1977 the defendant applied for leave to enter final judgment against the third party, alternatively, for third party directions as follows: (i) that the defendant deliver a statement of claim to the third party within 14 days from the date of this order who shall plead thereto within 14 days; (ii) that the defendant and the third party file an affidavit of documents within 60 days from the close of pleadings and there be an inspection of documents within 30 days thereafter; (iii) that the question of the liability of the third party to indemnify the defendant be tried together with the trial of the action between the plaintiffs and the defendant, and (iv) that the costs of the application be costs in the cause. On October 28, 1977 the plaintiffs applied for leave to enter final judgment against the defendant. These applications were, by consent, adjourned into open court and heard together.

The defendant submitted to judgment and the learned judge accordingly gave leave to plaintiffs to enter final judgment by consent. The application of the third party to set aside the third party notice was made on the following grounds:

(a) There is a question proper to be tried between the defendant and the third party in that the agreement was performed;

(b) The issue between the defendant and the third party forms the subject of a separate action *vide* High Court Kuala Lumpur Civil Suit No. 2323 of 1976 and is bad for duplicity;

(c) The service of the third party notice on the third party on 5th day of September, 1977 was bad.

Ground (c) was abandoned.

With regard to (a) the learned judge held that the third party had not performed their part of the agreement with the defendant. The basis of his decision is that without a proper instrument of transfer the defendant could not effectively deal with share certificate numbered 0227, in this instance to transfer it to the plaintiffs. He further held that section 162 of the Companies Act, 1965 and the arguments regarding laches, acquiescence and estoppel were irrelevant.

With regard to (b) the learned judge in the exercise of his discretion refused to allow consolidation of the present case with Civil Suit No. 2323/76. He said that there is a basic difference between the two causes of action; in the former, it is on the ground of failure of consideration, *viz.*, non-delivery of share certificates which have been paid for; in the latter, an action for rescission and damages based on fraud. Further, the evidence required to prove the allegations in respect of the two causes of action are not the same although the relief claim sought is the same.

In the circumstances, the learned judge dismissed the third party's application to set aside the third party notice.

It is common ground that in July 1974 Dr. Chong Kim Choy held 524,278 shares (see Annual Return of United Holdings for year ending July 29, 1974); in June 1975 he held 1,000 shares, the defendant held 50,000 shares, and the plaintiffs held 985,510 shares (see Annual Return of United Holdings for year ending June 30, 1975); and in December 1977, he held 524,278 shares, the defendant held 50,000 shares, and the plaintiffs held 462,232 shares (see Annual Return of United Holdings for year ending June 30, 1975); and in December 1977, he held 524,278 shares, the defendant held 50,000 shares, and the plaintiffs held 462,232 shares (see Annual Return of United Holdings for year ending December 15, 1977).

From these Annual Returns it is apparent that Dr. Chong Kim Choy held the disputed 523,278 shares in 1974; did not hold them in 1975 but held them again in 1977. During the period he did not hold them, the plaintiffs' shares increased by an equal number of shares but were similarly reduced in 1977. This came about by act of registering share certificate numbered 0227 in the name of the plaintiffs followed by deregistration and re-registration in the name of Dr. Chong Kim Choy.

The learned judge held as a fact that the first act of registration was erroneous. In doing so, he upheld the basic and entire case for the defendant against the third party.

With regard to the defendant's application of October 3, 1977 for summary judgment against the third party, alternatively, for third party directions, the learned judge held that there was no issue to go to trial and he gave leave to the defendant to enter final judgment in the sum of $4,186,224 as representing the refund of the purchase price of the undelivered shares comprised in share certificate numbered 0227 with interest. It would be sufficient if we echo his reasoning:

> "The fact remains that share certificate numbered 0227 is still registered in the name of Dr. Chong Kim Choy and neither the plaintiffs nor the defendant could deal with it. They have no right of sale and therefore there has been no effective sale by the third party to the defendant."

The third party appealed against the whole of the decision.

In this court counsel for the third party submitted a massive written argument in which he urged a complete reversal of the decision. We cannot possibly discuss in detail all his arguments but we will take each of his main submissions in turn.

We also have been referred to a great number of authorities by both counsel but we think for present purposes we shall be absolved from any disrespect for their arguments if we only refer to a few, because on certain points excerpts from the material authorities are assembled in them.

The question is therefore simply whether, at the hearing of the application for third party directions, the court is satisfied that there is a question proper to be tried between the defendant and the third party: see *Waterford Turkish Baths Co.* v. *Barter:*[1] *Greville* v. *Hayes.*[2] It is on such application that the validity of the third party notice and the objection of the third party will be gone into: see *Baxter* v. *France.*[3] If the court is so satisfied, and the facts are complex and disputed, the directions will be for trial. If not so satisfied the court may order judgment on the application of the defendant.

The liability of the third party may be established by an affidavit of the defendant or other persons analogous to an affidavit in support of a summons under Order 14 of the Rules of the Supreme Court to which no sufficient answer is made by the third party: see *Gloucestershire Banking Co.* v. *Phillipps.*[4] Therefore the third party who are onerated with the burden of satisfying the court that there is a question proper to be tried loses their case unless they can produce evidence to support it.

It is the contention of counsel for the third party that the directions should be for trial as there are many issues to be explored and it is therefore wrong for the learned judge to have accepted them as proven facts. The main triable issues relied on can be briefly stated.

It is argued on behalf of the third party that it is wrong for the learned judge to hold that since the

instrument of transfer Exhibit "HI" was not in proper form the defendant could not effectively transfer the share certificate numbered 0227 to the plaintiffs. In the course of the argument the following cases were cited, *Re Paradise Motor Co. Ltd.*,[5] *Fitch* v. *Lovell*[6] and *Hawkes* v. *McArthur*,[7] for the proposition that section 103 of the Companies Act is only a revenue section and that a transfer contravening the said section is not void but only an irregularity and a beneficial owner can deal with the shares pending registration. Section 103 is couched in the following words:

"Notwithstanding anything in its article a company shall not register a transfer of shares or debentures unless a proper instrument of transfer has been delivered to the company...."

In our opinion, the weight of the authorities which were cited supports the view that the third party can deal with the shares pending registration. We bear in mind the much quoted and commonsense warning by Devlin J. in *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[8] against a too-ready assumption of illegality or invalidity of contracts when dealing with statutes regulating commercial transactions.

The third party contend that the defendant's claim upon which he has obtained judgment is a claim for the return with interest of part only of the entire purchase price of $11,200,000 which he paid under what they allege was a single and indivisible contract for the purchase at that price of 1.4 million shares. As they had delivered to the defendant 976,722 of the 1.4 million shares, thus representing 63% of the whole contract, there had been part performance, and as the defendant had derived some of the benefit which he had bargained for, he cannot claim restitution to recover the purchase-money: see *Hunt* v. *Silk*.[9] This is based on the theory that the consideration is whole and indivisible, and that the courts will not apportion it unless the parties have done so. Another reason is that the parties cannot be restored to the situation in which they stood immediately before the time when the contract was made. Thus in *Taylor* v. *Hare*,[10] it was held that where a vendor sold a patent right, and the purchaser paid the purchase-money and used the patent right and enjoyed a benefit therefrom, but it afterwards appeared that the patent was invalid, the purchaser could not claim restitution of the purchase-money. See also *Lawes* v. *Purser*.[11]

Even if this contract was divisible as in the case of a sale of goods to be delivered by instalments (see section 38, Sale of Goods (Malay States) Ordinance No. 1 of 1957) and that there had been a failure of consideration in respect of a properly severable part of it, it is argued that the defendant cannot succeed in his claim for rescission and a return of part of his money unless he can make restitution. But restitution cannot be made if something transferred under the contract has altered its character. Thus in *Clarke* v. *Dickson*[12] rescission was refused where a partnership, in which the representee had been induced to take shares, had been converted into a limited liability company, for the existing shares were wholly different from those which he originally received.

As a variant or possibly as an extension of the above argument it is suggested that the Sales of Goods (Malay States) Ordinance No. 1 of 1957, which includes stocks and shares is also relevant. However, it is of significance to bear in mind that a little note of caution is necessary in applying the provisions of the said Ordinance as to the passing of possession and property in the goods; they present a certain difficulty in reconciling with the company law with regard to shares other than bearer shares since the legal ownership of the registered shares is determined by reference to the company's share register and transfer can be made only in written form and in conformity with the requirements of the articles of association. The section most relied on is section 13(2) which enacts:

"Where a contract of sale is not severable and the buyer has accepted the goods or part thereof or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract express or implied to that effect."

It is accordingly argued on the strength of that section that as the contract was not severable the only remedy of the defendant who had accepted a substantial part of the shares contracted for but claimed defect in title as to a small part is to maintain an action for damages for breach of warranty, and not for recovery of the purchase price.

In any event even if the contract was severable, it is further suggested that another issue fell to be determined which was wholly overlooked by the learned judge, namely, whether there was some conduct, by way of estoppel, on the part of the defendant amounting to acceptance in performance of the contract.

It is therefore suggested there is a flaw in the judgment and that if the learned judge had considered the defendant's claim in the context of the law of restitution he would have to consider the equitable doctrine of laches which he held not to be relevant. It is a well established principle that equity, in accordance with the maxim *vigilantibus et non dormientibus lex succurrit*, refuses to grant relief to stale claims. In the present case the claim was not made until over 2½ years after the contract had been completed in December 1974 and the defendant has been throughout and remains in enjoyment of the management and control of United Holdings, and very substantial changes have been made in the company's financial affairs in the interim — see 1975 Annual Report. In the circumstances it is argued that as the defendant has been dilatory in the prosecution of his claim and has acquiesced in the wrong done to him, is guilty of laches and is debarred from relief: see *Lindsay Petroleum Co.* v. *Hurd*[13] quoted with approval by Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Company*.[14]

The defendant naturally fortifies his case on the authority of such cases as *Rowland* v. *Divall*,[15] *Biggerstaff* v. *Rowatt's Wharf, Ltd.*[16] and *Platt* v. *Rowe*[17] for the proposition that the defendant can nevertheless rescind the contract and recover back the price paid as there has been a total failure of consideration. It is said here that he did not get what he had paid for, namely, the shares comprised in share certificate numbered 0227 because the transferee named therein was International Holdings.

In considering this proposition it becomes necessary to examine these cases in order to determine what is the accepted principle. The present case, it is urged, is no different from that of *Biggerstaff* v. *Rowatt's Wharf, Ltd., supra.* In that case Harvey, Brand & Co. bought from a limited company and paid for 7000 barrels. There was a short delivery of 400 barrels. It was held that it was a severable contract and Harvey, Brand & Co. could sue for money had and received for the short delivery on the ground of total failure of consideration as regards the barrels not delivered.

In *Platt* v. *Rowe, supra,* it was held that there was a total failure of consideration where the shares were not registered in the name of the transferor, and the purchaser could recover the purchase price from him.

The authority most relied on is *Rowland* v. *Divall, supra.* The defendant sold a car to the plaintiff which, unknown to either of them, had been stolen. The defendant was in breach of the implied condition that he had a right to sell the car but the plaintiff did various acts, namely, he repainted the car and resold it to a customer. It was not discovered that the car was a stolen car until the police seized it. The plaintiff and his purchaser between them had possession of it for about four months. It was held that the plaintiff could recover the purchase price as there had been a total failure of consideration: he had not "received any portion of what he agreed to buy ... the person who sold it to him had no right to sell it and therefore he did not get what he paid for — namely, a car to which he would have title; and under those circumstances the user of the car by the purchaser seems quite immaterial for the purpose of considering whether the condition had been converted into a warranty", *per* Bankes L.J. at page 504.

It is important to bear in mind that the claim was for breach of an implied condition on the part of the seller that he had the right to sell the car. Bankes L.J. said at page 503: "The plaintiff now brings his action to recover back the price that he paid to the defendant upon the ground of total failure of consideration. As I have said, it cannot now be disputed that there was an implied condition on the part of the defendant that he had a right to sell the car, and unless something happened to change that condition into a warranty the plaintiff is entitled to rescind the contract and recover back the money. The Sale of Goods Act itself indicates in section 53 (section 59 of our Ordinance No. 1 of 1957) the circumstances in which a condition may be changed into a warranty: 'Where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty' the buyer is not entitled to reject the goods, but his remedy is in damages. Mr. Doughty contends that this is a case in which the buyer is compelled to treat the condition as a warranty within the meaning of that section, because, having had the use of the car for four months, he cannot put the seller in *status quo* and therefore cannot now rescind, and he has referred to several authorities in support of that contention. But when those authorities are looked at, (referring to *Taylor* v. *Hare, supra, Hunt* v. *Silk, supra, Lawes* v. *Purser, supra*) I think it will be found that in all of them the buyer got some part of what he contracted for."

The decision in *Rowland* v. *Divall, supra,* has been the subject of comment by text-book writers as a decision which "rests basically on a fallacy", see *Atiyah* on Sales of Goods, 5th ed. at page 502; *Treitel,* 30 M.L.R. at pages 146-149. In our view, that case can be explained on the basis that the contract was voidable and not void and that gave an election to the plaintiff to reject it within a reasonable time. The answer that the plaintiff gave was: "As soon as I knew that I had not got the property I took my action, and the fact that I had had the use of the car does not make any difference." Devlin J. commented on that statement as follows:

> "Clearly, the answer would not have been the same if the buyer, with knowledge of the true facts, had continued to use the car for another twelve months or so, and had then found that the market had fallen and that he would like to hand it back again; nor, of course, would it be open to the seller in such circumstances to appear one morning and take the car back again, and when the buyer protested, to say: 'The car was never yours, because I never had any property in it; I have never bought the property from the person who really owned it, and it has improved considerably in value, and now I want it back, and here is the price that you paid for it'; but that would necessarily be the result if the contract were void, and not merely voidable."

— see *Kwei Tek Chao* v. *British Traders and Shippers Ltd.*[18]

The present case is based on the representation that the third party was the beneficial owner of 1.4 million United Holdings shares and where, as it is alleged, there was misrepresentation, the contract was not void, but voidable at the option of the defendant. He must take action with reasonable promptness to rescind it on becoming aware of it. Otherwise the right to rescind may be lost. And it may be lost if he takes any benefit under the contract, or does something amounting to an acceptance of it after becoming aware of the misrepresentation. Further, he runs the risk of losing that right if, with knowledge of his right to rescind, he requests the other party to remedy the default. Another material consideration is restitution; if it is impossible, through altered circumstances, to restore the parties to their original positions, e.g., if the shares received by the defendant have, either because of his action or as a result of his acquiescence, undergone a substantial alteration, especially in a detrimental sense, he may lose his right to rescind.

Everything depends upon the facts of the case and the nature of the contract and these must be gone into upon a full investigation upon a witness action and not upon affidavit evidence.

At this stage of the proceedings we will not undertake a preliminary trial of the action beyond noting the several circumstances which lead us to the conclusion that the decision to give leave to the defendant to sign final judgment against the third party without trial was to say the least, wrong and unsupportable.

As has been noted, the whole contention, with which the judge agreed, of the defendant was that the registration of the shares was an error. An error im-

plies an honest mistake as to a fact, without there being any deliberation about it and especially without there being any purposeful gain derived from it. Whether the first act of registration is an error must therefore necessarily be tested by evidence, which the third party must be given the opportunity to cross-examine and should not be accepted at this stage on a mere suggestion or a bare assertion in an affidavit. This is particularly so, having regard to the several circumstances in the case. First, the plaintiffs are effectively Dato Koh Kim Chai and the defendant and the registration of the 523,278 shares in the plaintiffs meant that they now had 985,510 shares which with the 100,000 shares in the name of Dato Koh Kim Chai and the 50,000 shares in the name of the defendant gave them a holding of 1,135,510 shares out of the 2,000,000 shares issued, in other words, an absolute majority. And this majority they held from June 30, 1975, to December 15, 1977. It effectively enabled them to put Dato Koh Kim Chai and the defendant on the Board of Directors, displacing, among others, Dr. Chong Kim Choy. And, with their voting strength, they were enabled to do what they liked to do with the company and its assets. In the claim of the defendant against the third party, it is necessary, in our view, that this be gone into.

Accordingly, the significance of the correspondence between the secretary of the company and Dr. Chong Kim Choy. On March 17, 1975 the secretary of United Holdings wrote to Dr. Chong Kim Choy as follows:

"Dear Dr. Chong,

SHARE CERTIFICATE NO. 0227

I refer to the *transfer form signed by you* to cover certificate No: 0227 for 523,278 shares of United Holdings Bhd. *and return herewith* the said form for your cancellation.

As you are aware these shares were sold to Central Securities and subsequently to Mr. Koh Kim Chai, The transfer form executed by you is invalid as the transferee, International Holdings Pte. Ltd. has been inserted in the transfer form. As such I enclose herewith a new transfer form for your execution. Kindly sign on both sides of the transfer form marked by a pencil cross. On completion I shall be glad if you will return this to me immediately."

On April 22, 1975 he again wrote to Dr. Chong enclosing a copy of the transfer form for his signature. Then came the reply from Dr. Chong which was dated April 25, 1975:

"Dear Sir,

Share Certificate No. 0227 for 523,278

I acknowledge with thanks your registered letter dated 22nd instant. This *share certificate was held by me in trust for International Holdings (Pte) Ltd.*, and I had already transferred the same shares back to them without any monetary consideration. I am therefore *returning the original transfer form signed by me (transferee being I.H.P.L.) to you.* It is only proper that you transfer the shares to I.H.P.L. and get them to transfer the shares to whoever are the present legal owners. I regret that I cannot in good faith declare that I have received a sum of $11,486,109.52 from Syarikat Seri Padu Sdn. when this is not true, as it will give rise to further problems for me.

Yours faithfully,
(Dr. Chong Kim Choy)"

Now what are the reasonable and proper inferences to be drawn from these letters? In our view, the irresistible inferences are: the defendant had held the share certificate in question from the time he had received it from the third party to the time he delivered it to the plaintiffs without having it registered in his name. This was some 5 days after he had entered into the agreement of sale with the plaintiffs. When the plaintiffs sought to register it in their name, the secretary knew immediately that it could not be done. The secretary must have advised the plaintiffs because instead of rejecting the application to register the transfer outright, he endeavoured to obtain a registrable transfer from Dr. Chong Kim Choy, but despite the transferor's refusal and, it is to be stressed, despite his clear knowledge that it was wrong to do so, he did register the transfer in the name of the plaintiffs. Whether he did so of his own motion or at the direction of another or others will have to be seen. This fact will have to be adduced in evidence. If he did so because he was directed to do so, the identity and the motives of those under whose orders he ignored the provisions of law must be determined for a proper and final adjudication of the claim. What the secretary should have done, of course, was to refuse to register the transfer as being against the rules and return it to the party seeking the transfer. What he did, however, was otherwise than in accordance with his strict duties. He or someone else (there being another secretary) carried out the registration and then, later, much later, again in direct contravention of section 162 Companies Act, that is without any power to do so, and without an order of court, he deregistered the plaintiffs and, strangely, registered the same shares in the name not of International Holdings (Pte) Ltd. despite the latter letter, but in the name of Dr. Chong Kim Choy.

Thirdly, the suspension of trading of the company's shares on the Kuala Lumpur Stock Exchange. This was sought by Dato Koh Kim Chai and his Board of Directors on December 23, 1974 and was for the purpose of re-organising and restructuring, impliedly for the good of the company and the benefit of the shareholders. An application for re-listing was made on March 20, 1975, but alas for the pious hopes and the good intentions of the directors, approval to date has not been forthcoming. Clearly there is more to the case than meets the eye.

There appears therefore some justification for the conclusion that the defendant "had got some part of what he contracted for", and that is material consideration "that he had done something to convert the condition into a warranty" entitling him to seek his remedy, if any, in damages only. We agree with the third party's contention that the issues regarding laches, acquiescence and estoppel are in the circumstances not irrelevant as the learned judge held them to be. He had misdirected himself in law on those points quite apart from the further consideration of restitution which also was overlooked by him.

A point deserving consideration is this. It is argued on behalf of the third party that when the disputed shares were transferred to the plaintiffs in 1975, their name was placed by United Holdings on their register of members until it was unilaterally removed by them in 1977 without a court order under section 162 of the Companies Act. The section reads as follows:

"162. (1) If —

(a) the name of any person is without sufficient cause entered in or omitted from the register; or

(b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member —

the person aggrieved or any member or the company may apply to the court for rectification of the register, and the court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party to the application.

(2) On any application under sub-section (1) of this section the court may decide —

(a) any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand the company on the other hand; and

(b) generally, any question necessary or expedient to be decided for the rectification of the register.

(3) The court when making an order for rectification of the register shall by its order direct a notice of the rectification to be so lodged.

(4) No application for the rectification of a register in respect of an entry which was made in the register more than thirty years before the date of the application shall be entertained by the court."

The question, they contend, is whether United Holdings, having once registered the plaintiffs as shareholders, are entitled *propio motu* to strike them off the register? They argued on the strength of what was said in *Ward* v. *South Eastern Railway,*[19] United Holdings, having chosen to put upon the register persons having a perfectly good equitable title to be there, cannot afterwards of their own will and pleasure take them off on the simple ground that there is a flaw in their legal title. Since the register of members is *prima facie* evidence of matters inserted therein as required or authorised by section 158(4) of the Companies Act, it is further argued on the authority of *Re Derham and Allen Ltd.*[20] that only the court can rectify it on proper application under section 162; accordingly it is wrong on the part of United Holdings unilaterally to strike the plaintiffs' name off the share register. Since the plaintiffs are to be recognised as the registered owner it lay within their power to initiate rectification of the register. Section 162 is relevant in the present case and the learned judge was in error when he held that it was not.

The defendant's case is based on the proposition that what is shown in the register of members is not conclusive and that the company may rectify the register on the ground of mistake without going to court. Since the registrar of United Holdings had the power and had made the rectification, to go to court is irrelevant. A further argument is that what he had asked for was title to the disputed shares; it is patent from the instrument of transfer Exhibit "H1" that title was not transferred to him. In the circumstances it is suggested that the learned judge was not in error when he held that section 162 was not relevant.

The point has been considered many times in many cases. We do not propose to refer to all of them, but it is worth referring to a few which put the matter in its proper perspective. The power to rectify the register under the section is a summary remedy. The court on an application under the section may decide any question of title of any party to have his name entered or omitted from the register, whether such question arises between members and alleged members or between such persons and the company. It may also decide any incidental questions arising with the above, if expedient or necessary. Sometimes the summary procedure under the section is not an appropriate remedy. Thus where complicated questions of law and fact arise it is, we think, only proper to refer the parties to a suit, because rectification can also be had by a suit: see *In re Len Chee Omnibus Co. Ltd.*[21] In *Reese River Silver Mining Co.* v. *Smith,*[22] the application for rectification of the register on the ground of fraud and misrepresentations was by way of a suit against the company. And delay in applying for rectification will destroy the remedy. See *In re Len Chee Omnibus Co. Ltd., supra,* where it was held that two years delay was fatal; *Ansett* v. *Butler Air Transport Ltd.,*[23] where a suit for rectification of the share register was delayed in almost a year, it was held that the plaintiffs were not entitled to relief.

In the present case United Holdings had taken upon itself to rectify the register without any application to court for that purpose, and in justification of this procedure we were referred to the judgment of Jessel M.R. in *In re Poole Firebrick and Blue Clay Co. Ltd.*[24] (a case of common mistake and both parties were willing to rectify), to *In re Reese River Silver Mining Co., supra,* (directors should not wait for the filing of the bills to rectify the register if they knew that the contract had been entered into upon fraudulent representations) and to *Re Derham and Allen Ltd., supra,* (issues of shares at a discount require the sanction of the court). In this connexion the observation of Cohen J. in that case is apposite (page 36):

"I wish to say nothing to encourage directors to carry out rectification of a company's register without an order of the court being obtained in proceedings in which the right to rectification is duly established. The protection of the court's order is in the ordinary case essential to any rectification of the register by the removal of the name of a registered holder of shares."

In the present case United Holdings dispute the propriety of the plaintiffs to be on their register and in this regard we would refer to the observation of McCardie J. in *First National Reinsurance Co.* v. *Greenfield*: [25]

"I should add this with regard to the rectification of the register that an application to the court is only essential when the company disputes the right to rectification."

To that we need only add that expulsion of a member from the register is a serious matter and the company cannot take upon itself to alter it.

Be that as it may, it seems to us to be somewhat futile exercise to deal with this point because the real issue here is not whether section 162 of the Companies Act is or is not relevant, but whether rectification under the section is an appropriate remedy, or whether the remedy should be by way of a suit. We take the view that an application for rectification cannot be granted where there are serious disputes regarding title and the issues cannot be properly decided in the summary proceedings under the section. Delay is a material consideration. In the present case, the delay is almost 2 years. The *dicta* of Kay J. in *In re Scottish*

Petroleum Co.[26] point emphatically to the case here represented by the third party: "The law of the court is that a man must take proceedings to have his name removed with due diligence if he has any complaint to make." The observations of Baggallay, Lindley and Fry L.JJ. in that case support the view the third party are taking. If a man is too late to secure rectification it must follow that he is too late to avoid the contract. In that case the delay of a fortnight in repudiating the shares made it doubtful whether the repudiation in the case of a going concern would have been in time (page 434).

Having regard to all the circumstances of the case, we are of the view that the learned judge was wrong in giving summary judgment to the defendant. There is a question proper to be tried between the parties. That being so, it remains to consider the question of consolidation of the third party proceeding with Civil Suit No. 2323 of 1976.

The main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is "some common question of law or fact bearing sufficient importance in proportion to the rest" of the subject-matter of the actions "to render it desirable that the whole should be disposed of at the same time" (*Payne* v. *British Time Recorder Co.*,[27] *Horwood* v. *British Statesman Publishing Co., Ltd.*,[28] *Daws* v. *Daily Sketch*[29]). Where this is the case, actions may be consolidated where the plaintiffs are the same and the defendants are the same.

Now, the causes of action in this third party proceeding and Civil Suit No. 2323 of 1976, where the plaintiffs and the defendants are the same, arise out of the same series of transactions, i.e., purchase of United Holdings shares and short delivery of such shares, and in our view there are questions of fact or law common to them, e.g., where rescission is a common element of relief, it is only necessary to prove that there is misrepresentation, innocent or fraudulent.

We may add that in such circumstances, one of the tests in deciding whether consolidation should be ordered is to determine whether two inconsistent judgments will come into existence if it is not ordered.

We therefore allow the appeal with costs here and below and issue the third party directions in terms of the application of October 3, 1977 except prayer (iii), unconditional leave to defend, and consolidation of the third party proceeding with Civil Suit No. 2323 of 1976.

Appeal allowed.

Solicitors: *Mah-Kok & Din; Ng Ek Teong & Partners.*

S. PAKIANATHAN v. R.K. STALLARD

[F.C. (Raja Azlan Shah, Wan Suleiman & Syed Othman F.JJ.) November 16, 1978 & May 25, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 183 of 1977]

Practice and Procedure — Consent judgment — Order for damages made with consent of solicitor for appellant — Application to set aside order — No consent given by appellant.

In this case judgment had been entered against the appellant for broker's commission alleged to be lost as a result of the appellant's breach to perform his obligation as a guarantor under an agreement. The learned judge ordered the Senior Assistant Registrar to assess damages. The Senior Assistant Registrar made an order, with the consent of the then solicitor for the appellant, that the appellant pay the respondent A$42,375 as damages. The appellant thereupon applied to have the order set aside as he stated that the solicitor had no authority to give consent and that there was no sufficient evidence relating to the damages.

Held: in the circumstances of this case there would be grave injustice, if the consent order were allowed to stand and therefore the order should be set aside.

Case referred to:-

(1) *Marsden* v. *Marsden* [1972] 2 All E.R. 1162.

FEDERAL COURT.

J.R. Devadas for the appellant.

K. Thayalan for the respondent.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): This appeal is against the dismissal by the High Court at Kuala Lumpur of a notice of motion in which the appellant (defendant in the action) sought that a court order entering judgment against him with damages to be assessed be set aside and a retrial ordered; or, alternatively, that the consent order as to assessed damages by the Senior Assistant Registrar (SAR) be withdrawn and a fresh enquiry made as to damages, and further, by an amended notice of motion, that an order for stay of the signing and filing of the Certificate in the SAR's order as to assessed damages.

The circumstances leading to the application may be summarised as follows: The respondent brought the action against the appellant claiming $268,545.64 equivalent to A$77,652.50 said to be the broker's commission the respondent had lost as a result of the appellant's breach to perform his obligation as a guarantor under an agreement. The respondent was broker agent, industrial auctioneer for marine construction and earth moving, mining and general plants. He was appointed agent to dispose of certain machineries and accessories by a company in Western Australia, which was receiver and manager appointed by another company, who held a debenture over the machines and accessories. By an agreement dated January 4, 1973 the respondent sold to two persons in Malaysia certain items of machineries at the purchase price of A$617,900 or its equivalent in Malaysian currency. A clause in the agreement provided that the purchasers would arrange irrevocable letters of credit for the full purchase price to remain valid for 3 months from the date of the agreement and in the event of the purchasers failing to do so, the appellant undertook to arrange for similar letters of credit in his name for a period of 6 months from the same date. Another clause provided that in the event of